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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 654

THE UNITED STATES OF AMERICA, PETITIONER

v.

RETTA A. MARR, ADMINISTRATRIX OF THE ESTATE OF EDWIN EUGENE WILKINSON, DECEASED; ALBERT ERBELE; AND ROBERT M. LITTLEJOHN, ADMINISTRATOR OF THE ESTATE OF CHARLES WESLEY LITTLEJOHN, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in these cases on December 2, 1952, by the United States Court of Claims.

OPINION BELOW

The opinion of the Court of Claims, which covers all three cases (R. 19-24), is reported in 106 F. Supp. 204.

JURISDICTION

On July 15, 1952, the Court of Claims denied petitioner's motions for summary judgments and found respondents entitled to recover, but suspended the entry of judgments pending the filing of reports by the General Accounting Office to show the amounts due (R. 25). On November 4, 1952, the court denied petitioner's motions for reconsideration (R. 31-32) and on December 2, 1952, it entered judgments in these cases (R. 32-33). On February 27, 1953, Mr. Chief Justice Vinson extended the time for filing a petition for a writ of certiorari to and including March 12, 1953 (R. 33-34). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether certificates of settlement issued by the Comptroller General more than six years after the accrual of the claims involved therein, pursuant to his authority to settle and adjust claims received in the General Accounting Office within ten years after accrual, and for the payment of which claims Congress failed to appropriate funds, constituted accords which revived jurisdiction in the Court of Claims.

STATUTES INVOLVED

28 U.S.C. (Supp. V) 2501 provides in pertinent part as follows:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by

> the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

The pertinent provisions of the Budget and Accounting Act, 1921, 42 Stat. 20, 24, provide as follows:

> Sec. 304. * * * The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * * [31 U.S.C. 44.]
>
> Sec. 305. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office. [31 U.S.C. 71.]

The Act of April 10, 1928, 45 Stat. 413, 31 U.S.C. 236, provides:

> That when there is filed in the General Accounting Office a claim or demand against the United States that may not lawfully be adjusted by the use of an appropriation theretofore made, but which claim or demand in the judgment of the Comptroller General of the United States contains such elements of legal liability or equity as to be deserving of the consideration of the Congress, he shall submit the same to the Congress by a special report containing the material facts and his recommendation thereon.

The Act of October 9, 1940, c. 788, Sections 1, 2, 54 Stat. 1061, 31 U.S.C. 71a, 237, provides as follows:

> That every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Office under section 305 of the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), and the Act of April 10, 1928 (45 Stat. 413), shall be forever barred unless such claim, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after the date such claim first accrued: *Provided,* That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.
>
> Sec. 2. Whenever any claim barred by section 1 shall be received in the General Accounting Office, it shall be returned to the claimant, with a copy of this Act, and such action shall be a complete response without further communication.

STATEMENT

Edwin E. Wilkinson and Charles W. Littlejohn, intestates of respondents Retta A. Marr and Robert M. Littlejohn, respectively, and respondent Erbele were employed by the Alaska Road Commission, Department of the Interior, during periods which terminated on or prior to March 5, 1945 (R. 5, 10, 14). During their respective periods of service they

received no overtime pay pursuant to Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. 673c, for work performed by them in excess of forty hours per week (R. 27-29). In 1948 and 1949 they presented claims for overtime compensation to the General Accounting Office (R. 5, 10, 14).[1] That Office sent to each of them a "Notice of Settlement of Claim" which read in material part as follows (R. 5-6):[2]

> I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—
>
> THREE THOUSAND EIGHT HUNDRED SIXTY-TWO AND 34/100 Dollars ($3,862.34) on account of adjustment of compensation for overtime services rendered from May 10, 1938 to March 5, 1945, as an employee of the Department of the Interior, Alaska Road Commission, Juneau, Alaska.
>
> * * * * *
>
> Certificate to cover this settlement will be transmitted to the paying office and check in payment should be received in due course unless otherwise indicated hereon.
>
> The appropriation from which this claim is

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[1] The Marr claim was received in the General Accounting Office on May 10, 1948, and covered services from January 1, 1935 to March 5, 1945. The General Accounting Office's statement of settlement covered services through September, 1944. (R. 5-6, 29.) The Erbele claim was received on October 31, 1949, and covered services up to October 21, 1941. (R. 10-11, 29.) The Littlejohn claim was received June 1, 1948, and covered services from before June 1, 1938 up to March 4, 1945. (R. 14-15, 29).

[2] The certificate of settlement in the *Marr* case, reproduced in the text, is typical.

> payable is no longer available. The amount allowed herein will be forwarded to you when appropriation shall have been made by Congress.
>
> * * * * *
>
> Inasmuch as claim was not received until May 10, 1948, consideration of your claim for the period January 1, 1935 to May 10, 1938, is barred, since under the Act of October 9, 1940, 54 Stat. 1061, such claim must have been submitted within ten full years after the date such claim first accrued.

Thereafter, the claims were referred to the Secretary of the Interior, pursuant to General Accounting Office Circular No. 21 of June 25, 1925, 4 C. G. 1082, in order that he might seek a deficiency appropriation from which they might properly be paid (R. 28). In its appropriation requests for the Alaska Road Commission for the fiscal year 1951, the Interior Department requested $525,000 to pay such outstanding claims of that character (R. 21, 28; H. Rep. 1797, 81st Cong., 2d Sess., p. 180). The House Appropriations Committee deleted this amount from the appropriation bill, stating that after a thorough review of the request, the Committee was not convinced that the equities of the claims warranted payment, and preferred that the matter be presented to the Court of Claims, "where judicial processes are available to weigh all relevant considerations and to ascertain the equities involved".[3]

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[3] House Report 1797, 81st Cong., 2d sess., p. 180; see also House Hearings on Second Supplemental Appropriation Bill,

Respondents thereupon instituted these suits in the Court of Claims. The Marr suit was filed on January 24, 1951; the Erbele suit on February 14, 1951; and the Littlejohn suit on April 11, 1951 (R. 1, 9, 12). The Government filed motions for summary judgments on the ground that the six-year period of limitations had expired at the times the suits were instituted (R. 17-18).[4] The Court of Claims, Judge Whitaker dissenting, denied the motions. It held that respondents' suits were not premised on the original claims for overtime wages but were grounded on accords resulting from the Comptroller General's "unqualified statement[s]" that money was due, which caused new and independent claims to emerge out of the original claims on which they were based (R. 19-24). On December 2, 1952, the Court of Claims, on respondents' motions for summary judgments, entered judgments for the amounts set forth in the respective "Notices of Settlement of Claim[s]" sent to tive "Notice[s] of Settlement of Claim[s]" sent to the claimants by the Comptroller General (R. 32-33).[5]

1950, pp. 503-517; Senate Hearings on same bill, pp. 79-84; Senate Hearings on Interior Department Appropriations for 1951, pp. 1243-1246; Senate Report No. 1941, 81st Cong., 2d sess., p. 165.

[4] The Government admitted that, in the cases of Marr and Erbele, a short period of time was not barred by limitations (R. 21).

[5] Although only respondent Marr had filed a motion for summary judgment, the Court of Claims' opinion, which covered all three cases, declared that the other two plaintiffs were likewise entitled to recover (R. 24). Respondent Marr's counter motion for summary judgment was inadvertently left out of

REASONS FOR GRANTING THE WRIT

A claim against the Government for overtime compensation was filed with the General Accounting Office within the ten-year period permitted by the Act of October 9, 1940, 54 Stat. 1061, 31 U. S. C. 71a, 237, *supra*, p. 4. The Comptroller General sent a "Notice of Settlement of Claim" to the claimant advising him that his claim was allowable in a certain amount but that there was no appropriation available to pay it, and that payment would be made when Congress had made an appropriation for that purpose (R. 5-6).[6] In that situation, the Court of Claims held that the action of the Comptroller General in thus notifying the claimant became an accord between the Government and the claimant, which brought into being an entirely new claim, suit upon which might be maintained in that court despite the fact that the six-year statute of limitations (28 U. S. C. (Supp. V) 2501, *supra*, pp. 2-3) had expired with respect to the original claim at the time the suit was instituted. The necessary result of the court's holding also seems to be that since the accord merged the old claim into a new one, the court, in a suit on the assumed new claim, would be precluded from making an inquiry into the merits of the original claim, and would be required to enter judgment for the

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the transcript of the record, but no question is raised concerning its absence. It is reproduced in the Appendix, *infra*, p. 19.

[6] Congress subsequently declined to make the appropriation with the suggestion that the claims involved should be litigated in the Court of Claims. See *supra*, pp. 6-7.

plaintiff on the new claim even if the statute of limitations on the original claim had not already expired.

Since the decision has the effect of extending the period of limitations for filing suit against the Government on general claims from six to sixteen or more years,[7] and also deprives the Government of the benefit of a hearing on the merits of the original claim, the effect of the court's holding is to depart sharply from the long-established accounting practices of the Government which have not contemplated such far-reaching results from a settlement notice. The decision may also make it dangerous for the accounting officers of the Government to notify a claimant that his claim is worthy of consideration by Congress, since, if it is discovered before payment is made that the claim is without merit, the Government will not only be precluded from using the six-year limitations period as a defense, but might also be barred, even on the basis of an intervening pronouncement of this Court, from

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[7] A General Accounting Office allowance of a claim *received in said office within ten full years after the date such claim first accrued* may be made *after* the expiration of ten years. The six-year period, on the reasoning of the Court of Claims, would not begin to run until the allowance.

The position of the Comptroller General has been that the General Accounting Office "may consider claims barred in the courts by the 6-year statutes of limitations (28 U. S. C. 41(20), 262) but not yet barred by the 10-year statute, applicable to claims cognizable by the General Accounting Office (31 U. S. C. 71a)." Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1944, House Doc. No. 26, 79th Cong., 1st sess., p. 40; Annual Report of the Comptroller General for the Fiscal Year Ended June 30, 1948, House Doc. 16, 81st Cong., 1st sess., pp. 34-35.

showing that the original claim had no legal basis. Moreover, the decision overrides the considered refusal of Congress to appropriate moneys to pay the claims in question until they have been adjudi cted on their merits. The holding finds no support in law, and the issue presented is, we submit, plainly one of such public importance as to warrant review by this Court.

1. The power to enter into an accord or compromise is not inherent in any agency of the Government except the Congress, at least until the matter concerned is involved in litigation, and only Congress may delegate that power. No officer may be assumed to possess it, in the absence of a showing that it is necessary for the effective exercise of some power or powers which have been specifically granted. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 295-296; *Hawkins* v. *United States,* 96 U. S. 689, 691-692; *The Floyd Acceptances,* 7 Wall. 666, 667; *Compagnie Generale Transatlantique* v. *United States,* 51 F. 2d 1053, 1057 (C. A. 2); *Central Pacific RR Co.* v. *United States,* 24 C. Cls. 145, 153-154; cf. *Finn* v. *United States,* 123 U. S. 227, 232-233.

The Comptroller General neither has, nor claims to have, authority to enter into a binding compromise of a claim against the Government, unless expressly authorized by Congress to do so. He is an auditing officer and is not vested with power to administer the affairs of any agency of the Government other than his own. Historically, the function of the Comptroller General in connection with

claims is to examine them for the purpose of determining whether they arise under authority of law and whether there is an appropriation available to pay them.[8] He is independent of the executive departments (Budget and Accounting Act of 1921, Section 301, 42 Stat. 20, 23, 31 U. S. C. 41) and is a part of the legislative branch (Reorganization Act of 1945, Section 7, 59 Stat. 613, 616, 5 U. S. C. 133y-5). This close relation to Congress is a strong indication that Section 305 of the Budget and Accounting Act (*supra*, p. 3) does not give him the status of an administrative officer or tribunal with definite power to make findings on controverted issues. Cf. *Springer* v. *Philippine Islands*, 277 U. S. 189, 203; *People* v. *Tremaine*, 252 N. Y. 27, 43.

Likewise, the decisions construing the forerunners of Section 305 of the Budget and Accounting Act, 31 U. S. C. 71 (*i.e.* R. S. 236 and the Act of March 3, 1817, c. 45, 3 Stat. 366, Section 2) leave no basis for believing that any power to compromise claims was vested in the comptrollers and auditors in the Treasury Department,[9] to whose

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[8] *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 4, fn. 2; *Waters* v. *United States*, 21 C. Cls. 30, 37, affirmed, 133 U. S. 208; W. F. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* (1927), p. vii; Darrell Hevenor Smith, *The General Accounting Office* (1927), pp. 73-74, 83.

[9] See *Chorpenning* v. *United States*, 94 U. S. 397; *United States* v. *Waters*, 133 U. S. 208, 215, 216; *William Cramp & Sons* v. *United States*, 216 U. S. 494; *Savings Bank of Pittsburgh* v. *United States*, 16 C. Cls. 335, 350-351, affirmed, 104 U. S. 728; *Longwill* v. *United States*, 17 C. Cls. 288, 291; *Mumford* v. *United States*, 31 C. Cls. 210, 216.

powers the Comptroller General succeeded. *Globe Indemnity Co.* v. *United States,* 291 U. S. 476, 479-480; cf. *Skinner & Eddy Corp.* v. *McCarl,* 275 U. S. 1, 4. "The chief change effected by the Budget and Accounting Act was that it transferred powers lodged with officers of the Treasury Department to the Comptroller General and made his office independent of the executive branch of the government. But the function which he exercises in auditing and settling claims against the government is precisely that which was previously exercised by the Accounting Office in the Treasury Department." *Globe Indemnity Co.* v. *United States, supra,* at p. 480.[10]

The Act of April 10, 1928, c. 334, 45 Stat. 413, 31 U. S. C. 236, *supra,* p. 3, which confers authority upon the Comptroller General to report and recommend to Congress the allowance and payment of claims not lawfully adjustable by the use of an appropriation theretofore made, appears to be a clear recognition by Congress that in the absence of an available appropriation the maximum power of the Comptroller General under the Budget and Accounting Act in connection with claims against

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[10] "These different processes in the settlement of claims and demands upon the Government from their receipt by the Auditor, through the several stages of examination, certification, and drawing of warrants for payment up to the time when the Treasurer issues his drafts, are all *matters of accounting,* to justify the Treasurer in paying out the public money, and are not consummated beyond recall until the claimants receive the negotiable drafts of that officer, * * *." *McKnight* v. *United States,* 13 C. Cls. 292, 305, affirmed, 98 U. S. 179 [Italics supplied].

the United States, is to audit and make recommendations, not to enter into accords. See House Report 491, 70th Cong., 1st sess., p. 2, which accompanied the bill (H.R. 9583) that later became the Act of April 10, 1928, *supra*.[11]

The term "accord",[12] used by the court below, is new in connection with the settlement and adjustment of claims against the Government in the General Accounting Office. Heretofore, balances stated by accounting officers of the Government have not been regarded as binding on the courts or on the Congress. *Chorpenning* v. *United States*, 94 U. S. 397, 399; *United States* v. *Harmon*, 147 U. S. 268; *Mississippi Central RR* v. *United States*, 23 C. Cls. 27, 30-31. Thus, the proposition that the Comptroller General is authorized to enter into a compromise of a claim through the medium of an "accord", which will serve as the automatic basis for the entry of a judgment within six years, finds no support in the decisions of this Court or in prior

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[11] The Act of October 9, 1940, 54 Stat. 1061, 31 U. S. C. 71a, 237, *supra*, p. 4, requiring claims to be presented to the Comptroller General within ten years after they first accrue is merely a statue of limitations, passed on the Comptroller's recommendation (Sen. Rep. 1338, 76th Cong., 3d sess., p. 1; 86 Cong. Rec. 2308, 12746) for the purpose of relieving the General Accounting Office of the burden of considering stale claims. That Act is, of course, neither a grant of authority to enter into accords nor an amendment to the statute of limitations applicable to suits against the United States in the Court of Claims.

[12] An accord is defined as a "contract * * * between creditor and debtor for the settlement of the claim by some performance other than that which is due." A.L.I. *Restatement of Contracts*, § 417, comment a.

practice. And, as noted, we find no statute which gives the Comptroller General that power.

2. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, offers no basis for implying that the Comptroller General has that power, as the court below assumed (R. 23). The power recognized in that case had a statutory basis, rather than one derived from an implied broad policy,[13] for the Commissioner of Internal Revenue had long been specifically authorized to "remit, refund, and pay back" taxes erroneously imposed (26 U. S. C. 3770), and the administrative and judicial remedies were so integrated that the filing of a claim for refund was an express condition precedent to suit. 26 U. S. C. 3772. In *United States* v. *Kaufman,* 96 U. S. 567, 570-571, the Court said of the Commissioner's allowance: "It is not the allowance of an ordinary claim against the government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted."[14]

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[13] Public policy is to be ascertained by reference to the laws and legal precedents. *Muschany* v. *United States,* 324 U. S. 49, 66.

[14] This Court also said in *United States* v. *Savings Bank,* 104 U. S. 728, 734: "An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress. Until an appeal is taken to the commissioner no suit whatever can be maintained to recover back taxes illegally assessed or erroneously paid." See *McKnight* v. *United States,* 13 C. Cls. 292, 308-309, affirmed, 98 U. S. 179, pointing out the inappositeness of these cases to a "settlement" by accounting officers. Speaking of the Commissioner's powers, the Court said in *Daube* v. *United States,* 289 U. S. 367, 371-372, "The statute had given him the position of an administrative tribunal."

Furthermore, this Court has declined to permit the concept of the *Bonwit Teller* doctrine to be enlarged even in cases involving the power of the Commissioner of Internal Revenue. In *Daube* v. *United States,* 289 U. S. 367, 372-373, Mr. Justice Cardozo, speaking for a unanimous Court, after recognizing that "By the ruling in the *Bonwit Teller* case a specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid", succinctly stated that "It is a ruling not to be extended through an enlargement of the concept of an account stated by latitudinarian construction."

3. The decision of the court below likewise erodes the general policy of Congress with respect to the litigation of stale claims asserted against the United States in the Court of Claims. That policy, embodied in 28 U.S.C. 2501, *supra,* pp. 2-3, is that all such claims shall be forever [15] barred unless suit thereon is brought within six years from the day on which the "claim first accrues." [16] Thus, the

[15] Prior to the enactment into positive law of Title 28 of the United States Code by the Act of June 25, 1948, 62 Stat. 869, the statute of limitations provision now appearing in 28 U. S. C. 2501 was embodied in Section 156 of the Judicial Code (28 U. S. C. (1946 ed.) 262), which contained the word "forever" immediately before the word "barred." No significance should be attached to the omission of the word "forever" from the present law as codified, since it is clear from the Reviser's Notes that no change of policy was contemplated.

[16] The same policy is manifested in the Act of October 9, 1940, *supra,* p. 4, which provides that claims shall be forever barred unless filed with the General Accounting Office within ten years from the date the claim first accrued.

Court of Claims is without power to entertain an action brought more than six years after the claim first accrues. *Standard-Vacuum Oil Co.* v. *United States,* 339 U. S. 157, 161. The statute is jurisdictional and may not be waived. *Munro* v. *United States,* 303 U. S. 36, 41; *Finn* v. *United States,* 123 U. S. 227, 233; *United States* v. *Wardwell,* 172 U. S. 48, 52; *B. Altman & Co.* v. *United States,* 69 C. Cls. 721, certiorari denied, 282 U. S. 863. And the Court of Claims itself has long held, in the absence of a particular statute specifically providing otherwise, that the time during which a claim is under administrative consideration in one of the departments or is before the General Accounting Office may not be excluded from the six-year statutory period for bringing suit. *L. E. Myers Co.* v. *United States,* 105 C. Cls. 459; *Love* v. *United States,* 104 F. Supp. 102; *Cohen, Goldman & Co.* v. *United States,* 77 C. Cls. 713; *Battelle* v. *United States,* 7 C. Cls. 297.[17]

In the instant case, the court below has departed from this long-established policy of Congress by setting up in the Comptroller General a hitherto unknown power to enter into an accord which not only gave rise to a new six-year period of limitations, but also precluded the courts from thereafter inquiring into the merits of the claims.

4. The court's application of the doctrine an-

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[17] That respondents' claims may be meritorious does not, of course, modify the rule. The statute of limitations often cuts off claims which are just and equitable. And here Congress specifically decided that payment should not be made without a judicial determination of the merits of the claims, *supra,* pp. 6-7.

nounced by it to the Comptroller General's notification of settlement is of grave concern to the Government, since the decision, if permitted to stand, is very likely to disturb fundamentally the system of adjusting and settlement of accounts long employed by the Government. Under the holding of the court below, the function and effect of Accounting Office notifications would be radically changed. And since the decision of the court below is at odds with its own prior holdings that certification by accounting officers is a preliminary matter of accounting, conferring no new rights,[18] the accounting officers may well be called upon to change this traditional practice and to refrain from notifying claimants of their affirmative conclusions lest their action have the effect of nullifying the statute of limitations and of forfeiting the Government's right to defend the claims on the merits should that be necessary or advisable.

As we have shown above, the question presented is one of large public importance which should be reviewed by the Court at this time. A conflict with a Court of Appeals is unlikely since the Court of Claims is the major forum for all claims against the Government, and after the holding below, it is improbable that suits of this type will be brought elsewhere.[19] Furthermore, we are advised that

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[18] *McKnight* v. *United States*, 13 C. Cls. 292, 305-306, affirmed, 98 U. S. 179; *Buffalo Bayou R. R.* v. *United States*, 16 C. Cls. 238, 245-246.

[19] There is a direct conflict between the decision of the court below and that of the United States District Court for the Northern District of Iowa (Cedar Rapids Division). On September 14, 1951, the latter court dismissed three suits with-

there are approximately six hundred claims for overtime compensation growing out of the particular situation involved here and that such claims aggregate about one-half million dollars.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

MARCH, 1953.

---

out opinion brought on identical claims on motions raising the statute of limitations. *Mach* v. *United States*, Civil No. 379; *McDonald* v. *United States*, Civil No. 381; *Wade* v. *United States*, Civil No. 384.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 50015

RETTA A. MARR, ADMX., PLAINTIFF,

v.

THE UNITED STATES, DEFENDANT

PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT

(Filed June 2, 1952)

Comes now the plaintiff, by his attorneys, and moves this Honorable Court to grant summary judgment for the plaintiff on the ground that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to the pleadings, exhibits attached thereto, plaintiff's opposition to defendant's motion for summary judgment, and to plaintiff's brief in support of this motion.

Respectfully submitted:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 654

THE UNITED STATES OF AMERICA, *Petitioner*

v.

RETTA A. MARR, ADMINISTRATRIX OF THE ESTATE OF EDWIN EUGENE WILKINSON, DECEASED; ALBERT ERBELE; AND ROBERT M. LITTLEJOHN, ADMINISTRATOR OF THE ESTATE OF CHARLES WESLEY LITTLEJOHN, DECEASED

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENT LITTLEJOHN IN OPPOSITION

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE RESPONDENT LITTLEJOHN IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19-25) is reported in 106 F. Supp. 204.

JURISDICTION

On December 2, 1952, the Court of Claims entered judgments in these cases. (R. 32-33) The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

We do not agree with Petitioner's statement of the question presented. There is no question in this case of reviving jurisdiction in the Court of Claims. The decisive question below and that presented here is:

Does a new cause of action arise in favor of a claimant who has filed his claim in the General Accounting Office and has received from the Comptroller General a Notice of Settlement of his claim certifying that there is due the claimant from the United States the amount of money for which his claim has been allowed?

STATUTES INVOLVED

28 U.S.C. (Supp. V) 2501 provides in pertinent part as follows:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

The pertinent provisions of the Budget and Accounting Act, 1921, 42 Stat. 20, 24, provide as follows:

> Sec. 304. * * * The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * * (31 U.S.C. 44)
>
> Sec. 305. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office. (31 U.S.C. 71)

The Act of April 10, 1928, 45 Stat. 413, 31 U.S.C. 236, provides:

> That when there is filed in the General Accounting Office a claim or demand against the United States that

> may not lawfully be adjusted by the use of an appropriation theretofore made, but which claim or demand in the judgment of the Comptroller General of the United States contains such elements of legal liability or equity as to be deserving of the consideration of the Congress, he shall submit the same to the Congress by a special report containing the material facts and his recommendation thereon.

The Act of October 9, 1940, c. 788, Sections 1, 2, 54 Stat. 1061, 31 U.S.C. 71a, 237, provides in pertinent part as follows:

> That every claim or demand * * * against the United States cognizable by the General Accounting Office under section 305 of the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), and the Act of April 10, 1928 (45 Stat. 413), shall be forever barred unless such claim, * * * shall be received in said office within ten full years after the date such claim first accrued: * * *.

STATEMENT

Charles W. Littlejohn, intestate of Robert M. Littlejohn, was employed by the Alaska Road Commission, Department of the Interior, from January 1, 1935, to March 4, 1945. (R. 12, 14) On June 9, 1947, Charles Littlejohn was told by the Commission that he was entitled to be paid for overtime work performed by him as an employee of the Commission, and was advised to file a claim in the General Accounting Office for it. (R. 16) On June 1, 1948, he filed a claim in the General Accounting Office for the amount of back pay due him for the overtime work he had performed. (R. 15, 22)

On September 13, 1949, the General Accounting Office sent Littlejohn a Notice of Settlement of Claim, as follows (R. 14, 15):

NOTICE OF SETTLEMENT OF CLAIM

General Accounting Office

cob

Washington, Sept. 13, 1949
(Date)

Claim No. 2702187

(In correspondence please refer to above claim No.)

CERTIFICATE No.
1773700
This certificate number will appear on the check to be issued in payment.

CHARLES W. LITTLEJOHN,
Room 504,
Savoy Hotel,
Seattle 1, Washington.

(Checks to be drawn as below)

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of

FIVE THOUSAND NINETY AND 37/100 DOLLARS ($5,090.37)

on account of amount due as overtime under the act of March 28, 1934, 48 Stat. 522, for services rendered as an employee of the Alaska Road Commission, Juneau, Alaska, during the period June 1, 1938 to March 4, 1945. (Department of the Interior)

14-1423	Construction and Maintenance of Roads, Bridges, and Trails, Alaska, 1938 Limitation 14-1423.001	$124.56

*(Appropriations continued on attached sheet)

Checks to issue:

Claimant as above,	$4,326.81
Treasurer of the United States,	$ 763.56

For credit to:

"14F5867 Special Deposits, Federal Tax Withheld from Salaries of Federal Employees, Department of the Interior"

(See attached sheet)

Certificate to cover this settlement will be transmitted to the paying office and check in payment should be received in due course unless otherwise indicated hereon.

MEMORANDUM

The appropriation from which this claim is payable is no longer available. The amount allowed herein will be forwarded to you when appropriation shall have been made by Congress.

Claimant's Notice in Advance of Payment

Thereafter, the House Appropriations Committee denied the request of the Interior Department for an appropriation to pay Respondents' and others' claims, stating:[1]

> The Committee has denied the estimate for $525,000 for payment of claims stated to be due as overtime compensation for work performed in 1945 and prior fiscal years for the Alaska Road Commission. The Committee has thoroughly reviewed this request and is not convinced that the equities of these claims are sufficient to warrant approval of the requested appropriation. These matters should be presented to the Court of Claims where judicial processes are available to weigh all relevant considerations and to ascertain the equities involved. The Court can also establish whether or not any offsets might be due the Government. The action of the Committee in denying this appropriation should not be considered as prejudicial to any litigation which might ensue.

On October 20, 1950, Littlejohn was informed by the Alaska Road Commission that Congress had failed to appropriate any money to pay his claim as certified by the General Accounting Office, and that he should proceed in the Court of Claims. (R. 16)

Charles W. Littlejohn died on January 29, 1951, (R. 13), and this Respondent, Robert M. Littlejohn, was appointed to serve as administrator of his intestate's estate. This suit was filed in the Court of Claims on April 11, 1951. (R. 12)

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[1] H. R. No. 1797, 81st Cong., 2d Sess., page 180 (Report to accompany H. R. 7786)

On April 1, 1952, Petitioner moved for summary judgment (R. 18) on the theory that the Court of Claims lacked jurisdiction since more than six years had elapsed between the time that Charles W. Littlejohn had last worked for the Alaska Road Commission and the time the suit was filed, and that, accordingly, the suit was barred by the six year statutory period of limitations. (R. 21)

Respondent Littlejohn opposed Petitioner's motion on the theory that the allowance of the claim and certification thereof by the Comptroller General on September 13, 1949, constituted an account stated which was a new cause of action that was not barred by limitations. (R. 21)

This Respondent, contrary to the recitation in the opinion below (R. 24), also filed a counter motion for summary judgment on the theory that in the absence of fraud or mistake, neither of which was alleged in opposition to the motion by Petitioner, Respondent was entitled to judgment on the account stated.

Petitioner's motion was argued on June 2, 1952, and was denied on July 15, 1952. (R. 19) At the same time, the Court of Claims granted Respondents' motions for summary judgment. (R. 24)

On September 22, 1952, Petitioner filed a motion for reconsideration predicated on an affidavit of Mr. A. B. Thomas of the General Accounting Office. (R. 26-31) Respondents opposed this motion and moved to strike the supporting affidavit for the reason that it failed to comply with Rule 51(e) of the Rules of the Court of Claims. On November 4, 1952, the Court entered an order overruling Petitioner's motion for reconsideration (R. 31), and on December 2, 1952, entered judgment for Respondents. (R. 32)

ARGUMENT

This is a simple case that does not present any question worthy of certiorari. The Court of Claims has neither enlarged its jurisdiction nor ruled in conflict with decisions of this Court or its own prior decisions, and Petitioner does not seriously make either contention.

All that the Court of Claims did was apply basic principles of law to the facts before it. True, those facts were somewhat unusual, but the law invoked was not, and an analysis of the case will show that the Court of Claims correctly decided the issues before it.

Petitioner moved for summary judgment below on the ground that Respondents were seeking to recover on claims that were barred by the six year jurisdictional statute. Respondents answered that their suits were not founded upon claims for money for back pay due, but on separate, independent causes of action that accrued when the Comptroller General allowed in part their claims for back pay and certified to them that the United States owed them the sums for which they claimed judgment. The issue thus raised was simple: did the allowance and certification of Respondents' claims by the Comptroller General create new causes of action upon which they could bring suit? The Court of Claims held that new causes of action were created and that Respondents' suits were timely filed.

After denying Petitioner's motion for summary judgment, the Court granted Respondents' motions for summary judgment since Petitioner did not allege the existence of any factual controversy or defense at law except lack of jurisdiction. Petitioner now complains that the ruling below will preclude it from defending similar cases on the merits and will result in the future in the automatic entry of judgment against the United States. The fact is that Petitioner could have raised any defense on the merits it might have had,[2] and could even have filed a counterclaim, if it had grounds for one, but for reasons best known to it, did not choose to contest the merits of these cases.

1. The Court of Claims correctly decided that new causes of action accrued in favor of Respondents when the Comptroller General allowed their claims in part and certified to

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[2] *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, 26 L. Ed. 908; *United States* v. *Kaufman*, 96 U. S. 572, 24 L. Ed. 792; also, see generally, 1 *Am. Jur.* p. 285, sec. 30, 31.

them that the United States owed them the balances stated.

The principle applied in *Bonwit Teller & Co. v. United States*[3] is applicable here. In that case, a taxpayer claimed that it had overpaid its taxes and applied for a refund. The Commissioner of Internal Revenue agreed that an overpayment had been made and issued a certificate of overassessment to the taxpayer in the amount claimed. Payment in full was not made to the taxpayer because the Collector applied as a credit part of the amount certified to a prior tax year. The taxpayer accepted payment of the balance under protest, asserting that the prior tax year in question was barred by limitations, and filed suit in the Court of Claims for the balance due. The applicable statute provided that a suit for refund of a tax erroneously paid could be brought within five years after payment of the tax or within two years of the disallowance of the claim by the Commissioner of Internal Revenue. The Government claimed the suit was filed too late. The Court of Claims dismissed the suit and this Court reversed, stating:

> The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to the plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570, 24 L. Ed. 792, 793; Real Estate Sav. Bank, 104 U. S. 728, 26 L. Ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225. There is no merit in the contention that the suit is barred.

The principle employed in the *Bonwit Teller & Co.* case is that a new cause of action, independent of the original claim, accrues to a claimant whose claim is allowed by an officer having authority to settle it on behalf of the Government and who also certifies to the claimant that there is a balance due him.

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[3] 283 U. S. 258, 75 L. Ed. 1018, 51 S. Ct. 395.

In the case at bar, the Comptroller General had not only the power, but the duty to settle and adjust Respondents' claims.[4] He also certified that balances were due the Respondents from the United States. The Court of Claims correctly held that a new cause of action, an accord, accrued in favor of Respondents and that their suits were timely brought.

Petitioner seeks to mitigate the holding of the *Bonwit Teller & Co.* case by quoting from *Daube* v. *United States*[5] to the effect that the ruling in *Bonwit Teller* should not be extended by "latitudinarian construction", but Mr. Justice Cardozo was specific in stating that in *Daube* no certificate was ever issued to the taxpayer, that in *Bonwit Teller* a certificate was issued, and that the delivery of a certificate was essential for a new cause of action to arise.

Petitioner also seeks to distinguish *Bonwit Teller & Co.* v. *United States, supra,* on the ground that the Commissioner of Internal Revenue there had the statutory power to "remit, refund, and pay back" taxes erroneously imposed.

Power to pay is immaterial. The point is that in *Bonwit Teller* and in the case at bar, the Commissioner of Internal Revenue and the Comptroller General, respectively, had the power to state on behalf of the Government whether the claims should be allowed and if so, for how much. It will not be denied that in this case, Respondents' claims would have been paid on the basis of the Comptroller General's certificates had money then been available.

Petitioner also contends that the Comptroller General lacked the power to enter into an accord. There is no doubt that the Government has the power to enter into an accord with its creditors.[6] Nor is there doubt that the Comptroller

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[4] 31 U.S.C. 71.

[5] 289 U. S. 367, 372-373.

[6] *Mason* v. *United States*, 17 Wall. 67, 21 L. Ed. 564; *Baird* v. *United States*, 96 U. S. 430, 24 L. Ed. 703; *United States* v. *Martin*, 94 U. S. 400, 24 L. Ed. 128; *St. Louis, B. & M. Ry. Co.* v. *United States*, 268 U. S. 169, 69 L. Ed. 899.

General was authorized specifically to settle and adjust Respondents' claims,[7] and to certify the balances due.[8]

Where a dispute exists concerning whether a claim filed in the General Accounting Office arises under a statute or not, determination by the Comptroller General that the claim is valid, and a certification by him that a part of the full amount claimed is due, acquiesced in by the claimant, constitutes an accord.

Recourse to the statute concerning special reports and recommendations by the Comptroller General to Congress[9] adds little force to Petitioner's argument. Not only did the Comptroller General not follow that statute, but nothing therein prohibits him from doing what he did in this case —determining that the claims were valid and certifying that balances were due Respondents. Not even Petitioner contends that. Basic law gives effect to the action of the Comptroller General.

2. The opinion below does not conflict with or depart from prior decisions of this Court or of the Court of Claims.

The Petitioner asserts that the decision below is in direct conflict with that of the United States District Court for the Northern District of Iowa,[10] but it does not appear that the Iowa Court had before it the question presented below, i.e., whether a new cause of action was created by the issuance of the certificates by the Comptroller General. If the same issue was passed on by the Iowa Court, we submit that Petitioner would have said so, but since the Iowa Court decided the case without an opinion its bare ruling is entitled to no weight here.

Petitioner also contends that the opinion below is "at odds" with *McKnight* v. *United States*, 13 C. Cl. 292, aff. 98 U. S. 179, that is said to have held that "certification by

[7] 31 U.S.C. 71.
[8] 31 U.S.C. 44.
[9] 31 U.S.C. 236.
[10] See page 17 of the Petition, footnote 19.

accounting officers is a preliminary matter of accounting, conferring no new rights".

In the *McKnight* case, $30,675.68 was awarded claimants' assignor by the auditor of the Treasury Department for supplies furnished the War Department. While the matter was still in the Treasury Department, the Second Comptroller and the Secretary of the Treasury ordered that $9,000 be retained in the Treasury to cover a contingent liability of claimants' assignor. The balance of $21,675.68 was paid claimants who later, after the six year statutory period had run, brought suit in the Court of Claims for the $9,000. Their suit was dismissed for limitations. There was no certification of their claim for $9,000. The $9,000 was expressly withheld from claimants who were paid all that was deemed to be due them. No balance was left. The action of the Comptroller in stating the particular account as $30,675.68 was subject to revision by the Secretary of the Treasury and was obviously not final action that could create any new rights. The action of the Comptroller was preliminary. Action by the Secretary was final.

In the case at bar, the Comptroller General is vested with the power to settle and adjust claims against the United States,[11] and the balances certified by him are conclusive on the executive establishment.[12] His action is final. *McKnight* v. *United States, supra,* is not in conflict with the opinion below.

Petitioner also contends, on page 13 of its Petition, that the effect of the opinion below is to make the balance stated to be due in the Comptroller General's certificate binding on the Court when suit is brought on the certificate. Nothing could be more erroneous. The statute[13] provides that balances certified are binding only on the executive branch of the Government, and the opinion below does not hold

[11] 31 U.S.C. 71.
[12] 31 U.S.C. 44.
[13] 31 U.S.C. 44.

the contrary. As heretofore stated, the balances so certified are *prima facie* evidence of the correct amount due and place on the Government the burden of impeaching them for fraud or mistake; they are not inviolate.[14] Nothing will prevent the Government from defending similar cases in the future on the merits.

Petitioner says it is advised that there are some six hundred claims "growing out of the particular situation involved here". We are advised that many of the claims for which the Department of the Interior sought appropriation had not been certified by the Comptroller General. In any event this is hardly a proper argument upon which to predicate an application for certiorari.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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[14] *United States* v. *Real Estate Savings Bank, supra; United States* v. *Kaufman, supra.*

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No. 654

IN THE

Supreme Court of the United States

October Term, 1952

THE UNITED STATES OF AMERICA, *Petitioner*

v.

RETTA A. MARR, Administratrix of the Estate of Edwin Eugene Wilkinson, Deceased

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Counsel for Respondent Marr

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In The

Supreme Court of the United States

October Term, 1952

No. 654

The United States of America, *Petitioner*

v.

Retta A. Marr, Administratrix of the Estate of Edwin Eugene Wilkinson, Deceased

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims (R 19-24), is reported in 106 F. Supp. 204. The opinion is so replete with sound logic, amply supported with discussion of cited applicable cases and statutes that elaborate argument seems unnecessary since it would be merely repetitious.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255; however, the question is raised as to this Court's jurisdiction to entertain a Petition for certiorari when application for extension of time was filed more than 90 days after the opinion of the Court of Claims as extended by a motion for new trial became final.

QUESTION PRESENTED

I. Whether the Court of Claims is correct in its opinion that the statute of limitations does not bar payment of overtime pay to an Alaska Highway manual laborer, claimant herein.

STATEMENT

Respondent suggests that no question of general importance or of substance is involved as required by the rules of this Court, there is no conflict, neither is there any other cogent reason indicated in the Petition for the granting of a writ of certiorari. Petitioner in the concluding sentence of his brief in support of Petition for certiorari states, "Furthermore, we are advised that there are approximately six hundred claims for overtime compensation growing out of the particular situation involved here and that such claims aggregate about one-half million dollars." While there is no substantiation in the record for this statement, if it is entitled to any consideration at all, it would appear to present one more reason why these other claimants whose claims would average less than nine hundred dollars each should not be required to expend it in litigation in order to collect.

In the case at bar the Court of Claims entered judgment for the claimant in the sum of $3,862.34, in companion cases, Eberle, $156.75, and Littlejohn, $4,326.81. Eberle appeared *pro se* but was not sufficiently well informed to do anything but file a petition in the form provided by the Court of Claims. The Court below, however, considered and decided all three cases together for the petitioners.

The Court's opinion was filed on July 15, 1952. Defendant's motion for reconsideration was filed September 22, 1952 and overruled on November 4, 1952.[1] On Feb-

[1] 28 U.S.C. Sec. 2101(c).

ruary 27, 1953, one hundred and fifteen days after the entry of the order of the Court of Claims overruling defendant's moiton for new trial, this Court granted an order extending the time for filing petition for writ of certiorari.

ARGUMENT

Petitioner herein will undoubtedly argue that the time for filing a Petition for a writ of certiorari begins to run from the entry of the formal document entitled "Judgment" entered by the Court of Claims in this case on December 2, 1952. This document merely comprises proof to the Treasury Department that the *amount* is due and payable. No motion for new trial or reconsideration as to this document is applicable. The Judgment from which appeal is taken and to which the decided cases make reference was filed in this case on July 15, 1952 and was called in the parlance of the Court of Claims, an "Opinion". It is this document to which the petitioner here objects, it is this "Opinion" (Judgment in the ordinary sense of the word)[2] which became final with the denial of the motion for reconsideration on November 4, 1952.[3]

Obviously this case was decided (adjudicated) July 15, 1952, assuming that the denial of defendant's motion for reconsideration on November 4, 1952 was a second judgment and that a document entered of record and labelled "Judgment" on December 2, 1952 was a third Judgment, as this Court said in *F.P.C. v. Idaho Power Co.* 344 U.S. 17, "*If the Court did no more by the second judgment than to restate what it had decided by the first one*, De-

[2] "The act of determining as in courts what is conformable to law and justice." (*Webster's New International Dict.*, 2d Ed., Unabridged.)

[3] "* * * plainly and properly settled with finality." *F.T.C. vs. Minneapolis-Honeywell Co.*, 344 U. S. 206.

partment of Banking v. Pink, 317 U.S. 264, *would apply and the 90 days would start to run from the judgment.*" The Court below at no time ever made any change in its first Judgment of July 15, 1952.

It seems clear that the time within which to apply for certiorari had long since expired when petitioner applied to this Court for an extension of time. Respondent might also argue if need be that since the Court below merely denied the motion for reconsideration, the time for filing a petition for a writ of certiorari was not tolled by the filing of the motion since "Only when the lower court changes matters of substance or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari begin to run anew." Cf. *Minneapolis-Honeywell* and cases cited, *supra.* Accordingly, the judgment, opinion, or decree of the Court of Claims was final on July 15, 1952. In any event it appears that the petition for certiorari was not timely.

As the record indicates, this case was presented to the Court of Claims upon motions for summary judgment. The respondent below filed such a motion and petitioner filed a counter-motion, not printed in the Transcript of Record, but attached as an appendix to petitioner's brief in this case. Defendant filed a motion for reconsideration together with an affidavit, both of which are printed in the Transcript. Petitioner filed in the Court of Claims, Opposition and Brief in Opposition to Defendant's Motion for Summary Judgment. Plaintiff also filed Opposition to Defendant's Motion for Reconsideration, as well as a motion to strike defendant's affidavit. These three documents were not included in the record but are printed herein in the appendix, as it is considered that they constitute a proper part of the record since they were considered by the Court below and should be available for this Court's consideration here.

While the Court of Claims overruled petitioner's motion to strike the affidavit of A. B. Thomas, Record, page 27, the Court also overruled defendant's motion for rehearing, so plaintiff then had no real grounds for complaint, although petitioner here is still of the view that the affidavit should have been stricken below and that it has no place in the record before this Court. The affidavit was not before the Court and had not been filed when the Court rendered its decision on July 15, 1952. This Court is respectfully referred to plaintiff's motion to strike the Thomas affidavit, printed in the appendix hereto.

In order that this Court may have the benefit of points and authorities considered by the Court of Claims, plaintiff's opposition to defendant's motion for summary judgment as well as plaintiff's opposition to defendant's motion for reconsideration are printed in the appendix hereto, to which the Court is respectfully referred for further argument on the merits.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari presents no question warranting review since there is no present conflict of decisions; and the decision of the Court of Claims is correct, and as that Court so aptly stated in its opinion, Record, pages 21-22, "There is nothing in the history of the government's treatment of the employees intended to be benefited by Section 23 to which the government can point with pride * * * *. It should not be necessary for a manual worker for the government to have a lawyer at his elbow on payday." The petition for certiorari should be denied.

Respectfully submitted,

EUGENE MEACHAM
Counsel for Respondent Marr

Supreme Court of the United States

No. 654 ....., October Term, 1952

UNITED STATES,

Petitioner,

vs.

RETTA A. MABB, Administratrix of the Estate of Edwin Eugene Wilkinson, deceased.

ORDER

UPON CONSIDERATION of the application of counsel for the respondent,

IT IS ORDERED that the time for filing respondent's brief in oppositon to the petition for writ of certiorari be, and the same is hereby, extended to and including May 4, 1953.

FRED M. VINSON
Chief Justice of the
United States

Dated this 22
day of April, 1953.

APPENDIX A

IN THE

United States Court of Claims

RETTA A. MARR, Admx.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 50015

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed June 2, 1952)

Comes now the plaintiff, by his attorneys, and opposes the defendant's Motion for Summary Judgment for the reason that the defendant is not entitled to judgment as a matter of law for the reasons set forth in the attached memorandum brief in support hereof.

Wherefore, it is respectfully submitted that this Honorable Court should deny the instant Motion for Summary Judgment.

Respectfully submitted:

/s/ ROBERT BURNS POE
ROBERT BURNS POE
Puget Sound National
Bank Building
Tacoma 2, Washington

/s/ EUGENE MEACHAM
EUGENE MEACHAM
824 Connecticut Ave.
Washington, D. C.

MEMORANDUM BRIEF IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant's Motion for Summary Judgment proceeds on the theory that the Court lacks jurisdiction for the reason that the claim in this case accrued more than six years prior to the filing of the petition. We submit that this theory is not applicable to the facts set forth in the petition and that the motion does not lie as a matter of law for the reason that the claim upon which suit is brought accrued on October 31, 1949, when the General Accounting Office stated the account between plaintiff's decedent and defendant.

This Court and the Supreme Court of the United States have both held that an account stated creates a new cause of action upon which suit may be brought in this Court, and that the period of limitation commences with the statement of the account. *Daube v. United States*, 289 U.S. 367, 77 L. Ed. 1261, 53 S. Ct. 597; *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 75 L.Ed. 1018, 51 S.Ct. 395; *Gage v. United States*, 83 Ct. Cl. 381, 14 F. Supp. 500; *Midpoint Realty Co., Inc. v. United States*, 30 F. Supp. 691, aff. 95 C.Cl. 63, 42 F. Supp. 76. A new cause of action based on an account stated arises when: 1) a debtor-creditor relationship exists between the parties; 2) one party, either debtor or creditor, states the account between the parties showing a certain fixed sum due from one party to the other; 3) both parties agree that the account as stated is correct; and, 4) the debtor promises to pay the balance due the creditor. *Daube v. United States*, 59 F. (2d) 842, 846.

We submit that the facts alleged in the petition set forth an account stated. These facts, which are admitted for the purposes of the motion, show that plaintiff's decedent worked for the Alaska Roads Commission; that he submitted a claim for back pay for overtime work to the

General Accounting Office; that on October 31, 1949, the General Accounting Office issued to him a "Notice of Settlement of Claim" (Ex. A-1) which stated the account between him and the United States, showing that there was due the claimant in settlement of his claim the sum of $3,862.34; and that "The appropriation from which this claim is payable is no longer available. The amount allowed herein will be forwarded to you when appropriation shall have been made by Congress."

The Alaska Roads Commission requested in its appropriation estimates for the fiscal year 1951 an amount to pay this claim and others. The Appropriations Committee of the House did not appropriate funds to pay the claims, stating that:

> "The Committee has denied the estimate for $525,000 for payment of claims stated to be due as overtime compensation for work performed in 1945 and prior fiscal years for the Alaska Road Commission. The Committee has thoroughly reviewed this request and is not convinced that the equities of these claims are sufficient to warrant approval of the requested appropriation. These matters should be presented to the Court of Claims where judicial processes are available to weigh all relevant considerations and to ascertain the equities involved. The Court can also establish whether or not any offsets might be due the Government. The action of the Committee in denying this appropriation should not be considered as prejudicial to any litigation which might ensue." H. R. No. 1797, 81st Congress, 2d Session, page 180 (Report to accompany H.R. 7786)

That plaintiff's decedent assented to the statement of his account by the General Accounting Office may be inferred from all of the circumstances of the case, *Shipley Construction & Supply Co. v. United States*, 7 F. Supp. 492; *R. H. Stearns Co. v. United States*, 291 U.S. 54, 78 L.Ed. 647, 54 S.Ct. 325, and is here clearly shown to be affirmed by the bringing of this suit. By the same token, certification of the allowance of the claim raised an im-

plied promise on the part of the United States to pay it, *United States v. Real Estate Savings Bank,* 104 U.S. 734, 26 L.Ed. 908, and the language of the certificate itself imports a promise to pay.

It is submitted that this case comes within the rule laid down in that series of cases holding that where a certificate allowing a claim has been issued by the proper authorities, and payment has been refused elsewhere, the claimant is authorized to bring suit in this Court on the certificate. *United States v. Kaufman,* 96 U.S. 572, 24 L.Ed. 792; *United States v. Real Estate Savings Bank, supra; United States v. Frerichs,* 124 U.S. 315, 31 L.Ed. 471, 8 S.Ct. 514; *Bonwit Teller & Co. v. United States, supra; Shipley Construction & Supply Co. v. United States, supra; Gage v. United States, supra; Clifton Manufacturing Co. v. United States,* 85 Ct.Cl. 525, 19 F. Supp. 723; *Otis Elevator Co. v. United States,* 92 Ct.Cl. 590, 36 F. Supp. 328; *Midpoint Realty Co. v. United States, supra.*

As in the Kaufman case, here there was an adjudication of a claim by an official authorized to state the account between the parties and to authorize payment of the balance due the claimant. There can be no doubt that the General Accounting Office had the power and authority to settle the claim of plaintiff's intestate, that the settlement and certification were an administrative adjudication of the validity and amount of the claim owed by the Government, and that settlement of the claim was final and conclusive upon the executive branch of the Government.

The Act of June 10, 1921, c. 18, sec. 305, 42 Stat. 24; T. 31 U. S. C. 71 provides that:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall

be settled and adjusted in the General Accounting Office.

And section 304 of the same Act, T. 31 U.S.C. 44, provides in part that, "The balance certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government."

The cases cited by the defendant in support of the proposition that the allowance and certification of the claim of plaintiff's decedent by the General Accounting Office did not create a new cause of action do not support the proposition asserted. Those cases uniformly hold that the action of accounting officers of the Treasury in *disallowing* a claim does not create a new cause of action, or, by itself, deprive the courts of jurisdiction to determine the claim. Submission of a claim to an executive department does not, *per se*, extend the period of limitations in this Court. However, allowance and certification of a claim by one authorized by act of Congress to state accounts on behalf of the Government, while not extending the period of limitations *on the claim*, does create a *new cause of action* with a new period of limitations.

We submit that in this case a new cause of action accrued on October 31, 1949, when the General Accounting Office stated the account between the parties, and that, for this reason, the defendant's motion should be denied since the petition herein was filed on January 24, 1951.

A TRUE COPY (Opposition to Defendant's Motion for Summary Judgment and MEMORANDUM Brief in Support of Opposition to Defendant's Motion for Summary Judgment)

TEST:

/s/ WAYNE A. ROBERTS
WAYNE A. ROBERTS, Assistant Clerk,
United States Court of Claims.

(SEAL)

APPENDIX B

IN THE

United States Court of Claims

RETTA A. MARR, Admx.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 50015

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RE-CONSIDERATION

(Filed Oct. 20, 1952)

Defendant's Motion for Re-consideration is based in part upon the hearsay affidavit of the Chief of the Claims Division of the General Accounting Office, comprised in almost complete entirety of alleged facts, conclusions, summarizations and interpretations not to be found in the record and not before this Court. It is further based on defendant's failure to take the time to analyze plaintiff's Opposition to Defendant's Motion and plaintiff's Cross Motion for Summary Judgment. As he states in his brief, he could have requested an opportunity to file

a supplemental brief and failed to do so. This is certainly not a substantial foundation around which to build a persuasive framework for re-consideration by the Court. His brief embodies much of the hearsay and argumentative statements contained in the Thomas affidavit in support of his motion. He states on page 4 of his brief, paragraph 1, "Congress intended that these cases be tried upon their merits" and that the claims should be adjudicated by this Court "where judicial processes are available to weigh all relevant consideration and ascertain the equities involved". He neglects, however, to comment that his own action in filing a Motion for Summary Judgment was intended to deny the plaintiff a trial upon the merits.

With respect to the foot-note [3] on page 5 of defendant's brief, it is also "interesting to note" that while the Comptroller General did "settle and adjust" the claims after they had been under consideration in his office for a year and a half, he also deliberately undertook to cancel his settlement after claimants had complied with the direction of Congress and filed suits with this Court. Nowhere is there the slightest indication that Congress intended to deny to these claimants payment of such amounts as might be determined to be due.

Defendant, with respect to his argument that the Comptroller General lacks authority to "settle and adjust" claims, states "In any event, the attached affidavit shows clearly that it has not been conferred upon the Comptroller General". The most careful scrutiny of the affidavit (Thomas) fails to disclose any foundation for this conclusion.

As to defendant's point 3 on page 8 of his brief "In any event, the certificates never became effective", plaintiff confesses that this is a fact otherwise she would not

have been compelled to employ counsel to present her case to this Court.

True also is defendant's statement that plaintiff's decedent originally claimed $2,111.02, though again there is nothing in the record to support this statement. Presumably, the Court will take judicial notice of the fact that laborers on the public roads do not keep records of their overtime especially when at the time of their labor they were not informed of their right to overtime pay. They were so informed on June 9, 1947, nine years after Wilkinson started to work and two years after he stopped! (Exhibit A attached hereto) Wilkinson, in response to his inquiry of a Government Agency, was informed that a "preliminary check-up" indicated the amount due to be $2,111.02. (Exhibit B attached hereto) Although the original claim is not before the Court, we do know from the "Notice of Settlement" that a portion of the amount claimed was excluded from the Comptroller General's adjustment and settlement.

A reading of the remainder of petitioner's brief indicates that little, if any, has been added to the presentation heretofore made by the defendant. Indeed the following quotation from the Court's opinion seems to be still applicable at this late stage of the proceedings: "There is nothing in the history of the Government's treatment of the employees intended to be benefited by Section 23 to which the Government can point with pride."

CONCLUSION

It is difficult to comprehend why Government representatives so tenaciously continue in their effort to prevent payment of monies admittedly earned at hard labor, and which Congress in 1934 said should be paid. There

must at some time come an end to this controversy. It is urged that the well-reasoned and sound decision of this Court should stand.

Respectfully submitted:

/s/ Robert Burns Poe
Robert Burns Poe
Pugent Sound National
Bank Building
Tacoma 2, Washington

/s/ Eugene Meacham
Eugene Meacham
824 Connecticut Avenue, N.W.
Washington 6, D. C.

Note: This motion is not printed for the reason that the amount here involved is the only asset of decedent Wilkinson's Estate.

EX. A

UNITED STATES
DEPARTMENT OF THE INTERIOR

Alaska Road Commission
Juneau, Alaska

Oct 19 1950

Mr. Edwin E. Wilkinson
Rt. 4, Box 881
Tacoma, Washington

Dear Sir:

Under date of June 9, 1947, employees of the Alaska Road Commission were furnished with information concerning their rights under national legislation covering wages and hours and conditions under which overtime pay would be allowed by government agencies operating under wage fixing boards or similar authorities (5 U.S.C. 673 c).

As a result of this notification, many employees and former employees have since filed claims with the General Accounting Office, Washington, D. C., and these claims have been referred by the General Accounting Office to the Alaska Road Commission for administrative review and recommendation. The Alaska Road Commission, in its appropriation estimates for the fiscal year 1951, included a request for funds to be used in paying such claims in the amounts approved by the General Accounting Office Claims Division; however, the Appropriations Committees of Congress deleted this provision from the 1951 Appropriation Bill and expressed the opinion that such claims should be submitted to the U. S. Court of Claims. In view of this action by the Appropriations Committees, the Alaska Road Commission wishes to in-

form claimants that their only recourse is to retain legal counsel and bring suit either singly or in a group in the United States Court of Claims.

This office has been informed that your claim (has) been certified by the General Accounting Office, Washington, D. C., amount $3,862.34.

If you wish to pursue this claim, further correspondence should be addressed to the United States Court of Claims, Washington, D. C., enclosing an extra copy of this letter which is attached for your use. If your claim has been certified by the General Accounting Office, a certified copy of the certificate of settlement sent you by that office should also be submitted to the Court of Claims as further evidence.

Very truly yours,

/s/ D. H. MILLER

D. H. MILLER, Chief
Administrative Division
Alaska Road Commission

Interior—A.R.C.—Juneau, Alaska

EX. B

UNITED STATES
DEPARTMENT OF THE INTERIOR
ALASKA ROAD COMMISSION
JUNEAU, ALASKA

May 6, 1948.

Mr. Edwin E. Wilkinson,
Berkshire Hotel,
1210½ - 2nd Ave.,
Seattle, Wash.

Dear Sir:

Answering your inquiry, the amount found due you for overtime on our preliminary check-up last year is $2,111.02. This includes the entire period of January 1, 1935 to March 5, 1945, when the Alaska Road Commission placed all employees upon a 40-hour week basis. Any amount that has elapsed through the operations of the statutes of limitations would be deductible from this amount.

Our circular of June 9th, informing employees of the possibility of additional amounts being due them for wages when in our employ, was issued as soon as the information was available to us, and as soon as we were instructed by the Department of the Interior. As explained in this circular, a copy of which you probably have, the Alaska Road Commission can take no further action on this matter until your claim is filed in the General Accounting Office (at Washington) and that office calls upon us for the additional detailed data.

So far as we know, the General Accounting Office has not yet ruled upon any of the claims of Alaska Road Commission employees that have been filed for payment

of overtime, although they no doubt have a number of these claims on hand.

Very truly yours,
/s/ G. H. SKINNER
G. H. SKINNER
Chief Clerk.

F. L. #12

A TRUE COPY of Plaintiff's Opposition to Defendant's Motion for Re-Consideration, and Exhibits A and B attached thereto:
TEST:

/s/ WAYNE A. ROBERTS
WAYNE A. ROBERTS,
Assistant Clerk,
United States Court of
Claims.

(SEAL)

APPENDIX C

IN THE

United States Court of Claims

RETTA A. MARR, Admx.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. 50015

PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT

(Filed Oct 20 1952)

Comes now plaintiff, by her attorneys, and moves the Court that it strike the affidavit of A. B. Thomas attached to defendant's Motion for Reconsideration. In support of this motion, plaintiff alleges:

1. The affidavit is not based upon the affiant's recollection as therein alleged.

2. It is replete with hearsay statements, conclusions and argument nowhere sustained by the record.

3. It is based on records, not recollection; records of the General Accounting Office as well as records and conversations with respect to which he has no direct knowledge.

In paragraph 2 of his affidavit, the affiant states that "he recently has refreshed his recollection by a re-examination of the files of the General Accounting Office per-

taining to such claims. The facts stated in this affidavit are based upon his recollection as so refreshed." Without wishing to reflect upon the integrity of the affiant, it is obvious that a stretch of imagination is necessary in order to reach the conclusion that the affiant, upon the date of his affidavit or shortly prior thereto, was possessed of any recollection which could be refreshed.

He states that several hundred similar claims were filed in 1947 and 1948. Obviously, hundreds or even thousands of other claims required his supervision and decision during this period. A mere reading of his affidavit conclusively demonstrates that no recollection, however refreshed, could possibly enable him to recite decisions of Courts by volume number and page number, together with page and paragraph of House and Senate Committee reports. In fact, he himself states in his affidavit what "the record here shows" p. 1-2.* Affiant's digest or summary of page 180 House Report No. 1797 (p. 2 & 3) is surely not based on recollection refreshed.

The decisions with respect to use of writings or memoranda to refresh recollection are in accord as to one proposition (i.e.) the basis of the testimony must be the refreshed recollection of the witness and the basis cannot be the content of the files as is here the case. Stated differently, the affiant in his affidavit was engaged in giving a summary and interpretation of the files of the General Accounting Office, as well as actions and conclusions of Departments and Committees with which he had no connection. The affidavit is a self-serving declaration of an interested party who would not be competent to testify as to the subjects discussed in his affidavit. See Putnam v. U.S., 162 U.S. 687.

The danger of stimulated testimony is pointed out in the case of Harrison versus Middleton (1854) 11 Gratt

* Page numbers refer to affidavit.

527, a Virginia case, in which the Supreme Court of Appeals of Virginia said "This kind of testimony is liable to abuse, the chief objection being that the paper referred to operates on the mind of a witness like a leading question, but is rendered necessary by the frailty of the human memory, and the abuse to which it is liable must be guarded against by the vigilance of the Court. . . . "If after looking at the paper the witness cannot speak from his recollection merely, his testimony, so far as he cannot speak from his recollection is inadmissible."

It seems that here the Court cautioned against the danger of the germ of being lead to adopt the memorandum, like the witness adopts a leading question. If, looking at the paper, the witness then testifies, not from an actual existing independent recollection, but from his recollection of the content of the memorandum as it relates the event, the abuse has occurred and the danger against which the Court has cautioned the trial courts to be vigilant, has become an accomplished injustice.

As the Court said in Volusia County Bank versus Bigelow (1903) 45 Fla. 638, 33 So. 704, that this sufficiently shows "that the memorandum was not used by the witness for the purpose of refreshing his independent recollection, but that she relied upon the memorandum as the basis of her testimony. There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory and its use as a basis for testimony regarding transactions as to which there is not independent recollection.

Presumably the Chief of the Claims Division is an attorney but, whether lawyer or layman, his affidavit must have been acceptable to the Department of Justice. On page 3 appears the following: "In addition, the following is the gist of the information communicated to this Office by a member of the staff of the House Appropriations Committee as to the reasons for the Committee action:",

then follows a completely hearsay "gist" of information "communicated to this Office" (not to affiant). We are left to guess who supplied the information, who received the information and who reduced it to "gist". Certainly such statements have no proper place in an affidavit.

Irrespective of the reasons stated on page 3 as to why the appropriation was denied, we do observe that despite the failure of the Department of Interior to furnish requested information to the Congress, the Committee did direct that the matter should be presented to the Court of Claims "where judicial processes are available to weigh all relevant considerations and to ascertain the equities involved." This plaintiff did.

On page 4 affiant states that the Controller General directed cancellation of the settlements "before he received actual notice of any of the three suits here involved and the action was impelled by the impeachment of the settlement by the Congress through its appropriate Committee, and not by the fact that those suits had been filed." This is indeed a strange statement in an affidavit sworn to by the Chief of the Claims Division who certainly must have had actual notice of the litigation and his mysterious failure to inform his Chief of the pending litigation is difficult to understand since affiant, by virtue of his position, must have been fully informed. In fact, he fails to include in his affidavit a statement that he personally was not aware of the three suits and his interpolation of the expression "actual notice", as well as his protestation that the filing of the suits was not the reason for the cancellation is interesting, to say the least. Why were the certificates cancelled in any event without ascertaining if suits had been filed with this Court? As well, also, it is difficult to understand why the reference of these cases to the Court of Claims by the Committee constitutes "impeachment of the settlements." The remainder of the affidavit is apparently intended as a legal

argument as to why affiant believes that the decision of the Court of Claims is wrong. Affiant's statement under oath, page 4, as to the conclusions he has reached after reading and undertaking to interpret the Court's decision is not persuasive. Neither is there any indication that affiant possesses the necessary legal training to enable him to read, digest and interpret the Court's decision. He relates how claims are "treated in this office" and that "they were not given any consideration" although "of course, some time was consumed in consideration of whether the claim was in the purview of the basic statute" (p. 5). He admits that the claims have not been considered to be of "doubtful validity" and then launches into an adumbrated discussion as to the difference between a "Notice of Settlement of Claim" and a "Certificate of Settlement". Apparently, not all officials in the Claims Division of the General Accounting Office draw the fine line of distinction as does affiant. Although in his affidavit he states (p. 6), "In the instant cases the only communication of this office with the claimants regarding the fact of settlement of their claims here was the 'Notice of Settlement of Claim'", the same office in a letter to claimant's counsel refers to "Certificate of Settlement" sent to claimant. (Paragraph 4 letter attached as Exhibit A) Indeed defendant's counsel in his Motion for Summary Judgment invites the Court's attention to the "Certificate of Settlement".

Certainly a claimant who has had a claim on file for a year and a half and who receives a "Notice of Settlement of Claim" with a statement

Certificate No.
1786634
This Certificate Number will appear on
the check to be issued in payment.

and a further statement "The amount allowed herein will be forwarded to you when appropriations shall have been

made by Congress" would not be particularly concerned as to what the intramural activities with respect to disposition of the original or various copies of the "Certificate of Settlement" by the General Accounting Office might be. He was amply justified in assuming that the next communication from the Government in this matter would be check No. 1786634.

Accordingly, it is submitted that the affidavit in support of defendant's Motion for Re-consideration should be striken.

Respectfully submitted:

/s/ Robert Burns Poe
Robert Burns Poe
Pugent Sound National
Bank Building
Tacoma 2, Washington

/s/ Eugene Meacham
Eugene Meacham
824 Connecticut Avenue, N.W.
Washington 6, D. C.

EX. A

Sep 11, 1950

GENERAL ACCOUNTING OFFICE
WASHINGTON 25

Claims Division
In Reply Please Quote
Misc-2968458-MS

September 5, 1950

Mr. Burns Poe,
Attorney and Counselor at Law,
Puget Sound National Bank Building,
Tacoma 2, Washington.

Dear Mr. Poe:

Receipt is acknowledged of your letter of August 8, 1950, advising that Edwin E. Wilkinson, former employee of the Department of the Interior, Alaska Road Commission, Juneau, Alaska, is now deceased, that Retta A. Marr, a niece of the decedent, has been appointed administratrix of his estate, and inquiring as to the prospects of receiving payment for the decedent's estate.

When claimants desire to be represented before this office by attorneys, the rules of procedure require the filing of a power of attorney to represent the claimant in the matter. An examination of the file fails to disclose a power of attorney executed by Retta A. Marr authorizing anyone to represent her in the instant matter.

However, you are advised that while copy of Certificate of Settlement No. 1786634, dated October 31, 1949, was transmitted to Edwin E. Wilkinson, now deceased, payment of the amount found due was being held in abeyance pending an appropriation of funds by The Congress of the United States.

For use in connection with the proper disposition of the matter, there is forwarded herewith Form 1055, which may be executed on the estate of the decedent by Retta A. Marr, administratrix of the decedent's estate, in accordance with the instructions printed thereon, and returned to this office with Certificate of appointment.

Very truly yours,

P. E. SOURS,
Chief of Section.
By: /s/ W. R. ALLEN

Enclosure

A TRUE COPY: OF Plaintiff's Motion to Strike Affidavit, together with Exhibit A attached thereto:
TEST:

/s/ WAYNE A. ROBERTS
WAYNE A. ROBERTS,
Assistant Clerk,
United States Court of
Claims.

(SEAL)